

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of TONY M. HUBBARD and U.S. POSTAL SERVICE,  
PLAINFIELD POST OFFICE, Plainfield, NJ

*Docket No. 99-1942; Submitted on the Record;  
Issued September 20, 2000*

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DECISION and ORDER

Before MICHAEL E. GROOM, A. PETER KANJORSKI,  
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant received a \$3,064.26 overpayment in compensation; and (2) whether the Office of Workers' Compensation Programs properly determined that appellant was not without fault in the creation of the overpayment.

On June 4, 1991 appellant, then a 28-year-old letter carrier, was delivering mail when he developed pain in his right leg. The Office accepted appellant's claim for right anterior tibial strain and anterior dislocation of the tibia. Appellant underwent surgery on January 6, 1997 for correction of a complex intrasubstance tear of the medial meniscus of the right knee, chondromalacia of the patella and hypertrophic synovitis. Dr. James M. Lee performed a partial meniscectomy, chondroplasty and partial synovectomy.

In a January 27, 1997 letter, the Office informed appellant that he would be paid compensation for temporary total disability every four weeks. The Office set forth the check cycle for appellant, indicating the dates of the four-week periods covered by each check. The Office informed appellant that the period of disability covered by each check would be printed on the check. The Office instructed appellant that, if he returned to work for any portion of the period, he must return the check to the Office or otherwise an overpayment would result. Appellant returned to work on July 7, 1997.

In an August 18, 1998 letter, the Office informed appellant that it had made a preliminary determination that he had received a \$3,064.26 overpayment of compensation because he returned to work on July 7, 1997 but received compensation through August 16, 1997. The Office made a preliminary finding that appellant was at fault in the creation of the overpayment because he should have been aware he was not entitled to compensation for total disability during a period in which he worked. The Office informed appellant of his right to submit evidence or arguments if he disagreed that an overpayment occurred, challenged the amount of the overpayment, or believed that the overpayment occurred through no fault of his own. The Office also informed appellant of his right to a prerecoupment hearing before an Office hearing

representative. In a January 14, 1999 decision, the Office found that appellant had received a \$3,064.26 overpayment in compensation and further found that the preliminary determination that appellant was at fault in the creation of the overpayment was correct.<sup>1</sup>

The Board finds that appellant received a \$3,064.26 overpayment in compensation.

Appellant returned to work on July 7, 1997. However, he continued to receive compensation until August 16, 1997. Appellant was not entitled to temporary total disability compensation after he returned to work full time at the employing establishment. He, therefore, received an overpayment of compensation for the period July 7 through August 16, 1997 because he was working while receiving temporary total disability compensation.

The Board further finds that appellant was not without fault in creation of the compensation overpayment.

Section 8129(a) of the Act provides, “adjustment of recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment of recovery would defeat the purpose of the Act or would be against equity and good conscience.”<sup>2</sup> Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

In determining whether an individual is with fault section 10.433(a) of the Office’s regulations provide in relevant part:

“A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect or
- (2) Failed to provide information, which he or she knew or should have known to be material; or
- (3) Accepted a payment, which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual.)<sup>3</sup>

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment.

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<sup>1</sup> The Board notes that the record contains a February 9, 1999 letter from appellant disputing the finding that he was at fault in the creation of the overpayment. The Board’s scope of review is restricted to the evidence that was before the Office at the time of the Office’s final decision prior to appeal. 20 C.F.R. § 501.2(c). The Board, therefore, cannot consider this letter on appeal.

<sup>2</sup> 5 U.S.C. § 8129(b).

<sup>3</sup> Section 10.433(a).

The Office, in its January 27, 1997 letter, indicated to appellant that he would receive compensation while he remained disabled. The Office gave appellant a schedule of the checks he would receive for compensation and the periods represented by those checks. Furthermore, the Office told appellant that the periods of disability covered by the compensation checks would be printed on the checks and gave appellant explicit instructions to return any checks received after a return to work that was for any period that overlapped with a period of work. In accepting checks for periods in which he worked, either in part or in whole, appellant accepted payments that he knew or should have known were incorrect. Where a claimant is at fault, the overpayment must be recovered, even if the overpayment resulted from negligence of employees of the government.<sup>4</sup>

The decision of the Office of Workers' Compensation Programs dated January 14, 1999, is hereby affirmed.

Dated, Washington, DC  
September 20, 2000

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member

Priscilla Anne Schwab  
Alternate Member

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<sup>4</sup> *Fergus Tait*, 30 ECAB 929 (1979)